LIBRARY
SUPREME COURT, U. S.
NOV 29
MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-849

PERRY RUSSELL TUNNELL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jerry Bain
TYNER, BAIN & TYNER
237 South Broadway
Tyler, Texas 75701

Attorneys for Petitioner

TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ of Certiorari | 5 |
| Question No. One Restated | 6 |
| Argument and Authorities Under Question No. One | 6 |
| Question No. Two Restated | 9 |
| Argument and Authorities Under Question No. Two | 10 |
| Question No. Three Restated | 16 |
| Argument and Authorities Under Question No. Three | 17 |
| Certificate of Service | 36 |
| Appendix 1 — Opinion of the Fifth Circuit | 1a |
| Appendix 2 — Order Denying Petition for Rehearing and Petition for Rehearing En Banc | 2a |
| Appendix 3 — Order Granting Stay of Mandate | 9a |
| Appendix 4 — Judgment | 10a |
| Appendix 5 — Excerpts from Transcript, pages 777-781 | 11a |
| Appendix 6 — Excerpts from Transcript, pages 5-7 | 15a |
| Appendix 7 — Excerpts from Transcript, page 13 | 18a |

TABLE OF CONTENTS (Continued)

Page

Appendix 8 — Excerpts from Transcript, pages 463-464 ..... 19a

Appendix 9 — Excerpts from Transcript, page 767 ..... 21a

Appendix 10 — Excerpts from Transcript, pages 771-772 ..... 22a

Appendix 11 — §1865. Qualifications for jury service ..... 24a

Appendix 12 — Excerpts from Transcript, page 6 ..... 25a

CITATIONS

*Cases*

Armes vs. Commissioner, 448 F.2d 972 (5th Circuit, 1971) ..... 25

Baines vs. United States, 426 F.2d 833 (5th Circuit, 1970) ..... 35

Blumberg vs. United States, 222 F.2d 496 (5th Circuit, 1955) ..... 26

Duncan vs. United States, 357 F.2d 195 (5th Circuit, 1956) ..... 27

Dyrth vs. United States, 327 F.2d 917 (8th Circuit, 1964) ..... 27

Flemister vs. United States, 260 F.2d 513 (5th Circuit, 1958) ..... 23

Ginsberg vs. United States, 257 F.2d 950 (5th Circuit, 1958) ..... 26

CITATIONS (Continued)

Page

Holland vs. United States, 75 S.Ct. 127 .. 17, 19, 21, 23, 24, 28, 33

Marcus vs. United States, 422 F.2d 752 (5th Circuit, 1970) ..... 15, 16, 35

Massei vs. United States, 241 F.2d 895 (1st Circuit, 1958, aff. 355 U.S. 595, 1958) ..... 26

Montoya vs. United States, 402 F.2d 847 (5th Circuit, 1968) ..... 27

Salinger vs. United States, 23 F.2d 48 (8th Circuit, 1927) ..... 27

Spies vs. United States, 317 U.S. 492, 63 S.Ct. 364 (1943) ..... 10, 17, 21, 24, 33

Triangle Club, Inc. vs. United States, 265 F.2d 829 (8th Circuit, 1959) ..... 27

United States vs. Beacon Brass Co., 344 U.S. 43 .... 29

United States vs. Bishop, 93 S.Ct. 2008 (1973) ..... 19

United States vs. Grosso, 390 U.S. 62 ..... 31

United States vs. Hayes, 390 U.S. 85 ..... 31

United States vs. Marchetti, 390 U.S. 39 ..... 31

United States vs. Newman, 468 F.2d 791 (5th Circuit, 1972) ..... 28

United States vs. Schorr, 462 F.2d 953 (5th Circuit, 1972) ..... 26

Vick vs. United States, 216 F.2d 228 (5th Circuit, 1954) ..... 27

CITATIONS (Continued)

Page

Wesson vs. United States, 172 F.2d 931 (8th Circuit, 1949) ..... 27

Will vs. United States, 389 U.S. 90 ..... 13, 14

*Other Authorities*

Brennan, "The Criminal Prosecution: Sporting Event or Quest for Truth," 1963, Washington University Law Quarterly, P. 279 ..... 11

Phillips, "The Motion for Acquittal; A Neglected Safeguard," 1961, 70 Yale L.J. 1151 ..... 26

Title 26, USC, Sec. 7201 ..... 1, 4

Title 28, USC, Sec. 1254(1) ..... 2

Title 28, USC, Sec. 1865(b)5 ..... 2, 4, 6, 8

Title 28, USC, Sec. 2403 ..... 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

---

No.

---

PERRY RUSSELL TUNNELL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioner, PERRY RUSSELL TUNNELL, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit. That Court affirmed the Judgment and sentence of the Federal District Court for the Eastern District of Texas whereby Petitioner was found guilty of violating 26 U.S.C. Section 7201 on three (3) counts and was sentenced to three (3) concurrent four (4) year sentences.

## OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported in 481 F. 2d 149, *U.S. vs. Tunnell* (5th Cir. 1973).

## JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on October 31, 1973, and this Petition for Certiorari was filed within thirty (30) days from such date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Title 28, U.S.C. 2403 is also applicable.

## QUESTIONS PRESENTED

1. The constitutionality of a portion of Title 28 U.S.C. 1865(b)5 is directly placed in issue by the Trial Court's overruling of Defendant's Motion in Limine and questioning prospective jurors as to whether any of them were or had been under indictment. Such action by the Court is prejudicial to the Defendant and amounts in criminal cases to a denial of due process of law and equal protection of the laws.

2. The Court erred in presenting its charge to the jury in two (2) regards:

(a) The Court failed to inform the jurors in accordance with requested instruction by Defendant that there were alternate civil remedies available for collection of tax. Without this instruction given to the jurors, they are led to believe that either the man goes scot-free or he is found guilty, when, in fact, there is an alternate method of civil remedies available for collection of alleged deficiencies of tax owed to the Government.

b. The Court erred in allowing Exhibits 257 and 258 (Income Tax Returns for 1963 and 1964, non-prosecution years) to be taken to the juryroom along with the Court's instruction at Page 1058 of the Transcript allowing intent in non-prosecution years to be used to supply intent for subsequent years.

3. There were cumulative errors committed in the trial of this matter which perhaps in and of themselves are not sufficient to overturn the conviction; however, when the totality of the circumstances is reviewed with the following errors pointed out to the Court, it is respectfully asserted that the probative value of the testimony and errors balanced against the prejudicial effect probably caused the rendition of an unjust verdict and penalty in the following regard:

a. Defendant was denied the names of the witnesses before trial to be called by the Government relating to alleged illegal activities and income. Defendant requested such names in a properly filed Motion for Bill of Particulars.

b. Evidence was admitted over objection of Defendant of prostitution income and kiting of checks, both matters being highly prejudicial but neither of which affected Defendant's taxable income.

c. The Government, over proper objection by Defendant, was allowed to have its fraud agent state the conclusion that he had run down all leads furnished by the Defendant without being specific.

d. The Trial Court erred in not granting Defendant's Motions for Judgments of Acquittal as a matter of law.

## STATEMENT OF THE CASE

Petitioner was convicted on three (3) counts covering years 1965, 1966, and 1967, of violation of Title 26 U.S.C. 7201, commonly referred to as the "Tax Evasion Statute." The first issue concerns the propriety of the Trial Judge inquiring of prospective jurors whether or not any member of the panel is under indictment. The Statute involved is Title 28 U.S.C. 1865 (b)5, being that part of the jury qualification concerning whether or not a juror is fundamentally disqualified. That part of the jury qualification concerning convictions is permissible — due process has been afforded the party convicted; and it is not admissible about the conviction of Defendant on the trial until he takes the witness stand or places his reputation in issue. But the fact of indictment of the defendant is presented to the jury, whether he takes the stand or not; and no due process is afforded the party indicted. It is respectfully asserted that in a properly filed Motion in Limine prior to the qualification of the jury panel and overruling of that Motion by the Trial Court and a Motion made to quash the jury panel after the question was asked has preserved and presented directly to this Honorable Court the question of the Constitutionality of that phrase concerning jury qualification pertaining to whether or not any of the members of the panel are under indictment.

With regard to the Court's charge submitted to the jury, the issue is raised by our second question as to whether or not jurors should be informed that there are alternate methods of collecting tax or asserting deficiences against individuals rather than a tax fraud trial. In view of the fact that each juror is a taxpayer, it is particularly significant that they be allowed to know there are numerous tax statutes and laws and that a finding of guilty or not guilty is not the one (1) single alternative available to the Internal Revenue Service. Likewise, in connection with the introduction of prior years tax returns ostensively for the purpose of showing an opening net worth when coupled with the Court's charge allowing intent in one (1) year to be used to supply intent for subsequent years, Defendant has been denied due process in allowing non-prosecution years for the purpose of upholding a conviction.

In Question No. 3 there is presented to the Court numerous errors that were committed during the course of the trial which seem to permeate all net worth tax fraud prosecutions, and it appears this would be a particularly pertinent case for the Court to set forth definitive guidelines on the admissibility of evidence in this hypothetical area of supplying figures by method of approximation.

**REASONS FOR GRANTING THE WRIT OF CERTIORARI**

In accordance with the qualifications for review on certiorari as specified in Rule 19 of the Rules of this Supreme Court, we believe that asking jurors if they are

under indictment is prejudicial to an indicted defendant in a criminal case. The Internal Revenue Service has gone far beyond safeguards guaranteed and protected by this Court in its former decisions concerning net worth prosecution cases, together with the fact that approximately twenty (20) years has passed since this Court set down a controlling decision in the *Holland Case*. We feel that the situation compels a determination of the rules for all taxpayers in the United States as well as Government employees charged with enforcement of tax fraud statutes for a set of guidelines to be used in future cases.

## QUESTION NO. ONE RESTATED

THE CONSTITUTIONALITY OF A PORTION OF TITLE 28 U.S.C. 1865(b)5 IS DIRECTLY PLACED IN ISSUE BY THE TRIAL COURT'S OVERRULING OF DEFENDANT'S MOTION IN LIMINE AND QUESTIONING PROSPECTIVE JURORS AS TO WHETHER ANY OF THEM WERE OR HAD BEEN UNDER INDICTMENT. SUCH ACTION BY THE COURT IS PREJUDICIAL TO THE DEFENDANT AND AMOUNTS IN CRIMINAL CASES TO A DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS. (Statute set forth in Appendix P. 21-22)

## ARGUMENT AND AUTHORITIES UNDER QUESTION NO. ONE

Defendant by this issue presents what is anticipated to be a new point not heretofore raised in any cases that counsel for Defendant is able to find. By Motion

in Limine prior to impaneling the jury and commencement for trial, counsel for Defendant requested that the Court not inquire of the prospective jury panel whether or not any member thereof was under indictment. (Transcript P. 109, Hearing on Motion and ruling of the Court, PP. 167-169) (Appendix this Brief, PP. 15a-17a.)

After qualification of the panel, a Motion to Quash the Panel was made. (Transcript P. 1078-1082) (Appendix this Brief, PP. 11a-15a.)

We believe that the Motion made to the Court is self-explanatory about what was sought and what the Court denied. In essence, of course, one (1) of the first words the jurors hear from the Trial Judge concerns the fact that if they are under indictment, they are disqualified from jury service, i.e. not pure. This informs the prospective jurors that an indictment does have a stigma attached to it, and such inquiry or instruction by the Court rebutts Defendant's presumption of innocence. It makes it abundantly clear to each one (1) of the prospective jurors that Defendant is not among his peers — "Defendant is indicted — he can't be one of us."

This statement informing the jurors that if they are under indictment they are fundamentally disqualified from jury service is made by that Honorable Trial Judge at a time when the jurors are awed by their presence in Federal Court. It is one (1) of the first words spoken to the jurors by the Court. It must be more meaningful as one of the first things that they hear; then after several days of testimony and per-

haps several weeks of trial, included in the middle of an hour dissertation by the Court in its charge on matters of law, there is hidden the innocuous statement that the indictment is no evidence of guilt. We respectfully assert that this procedure denies Defendant due process of law and equal protection of the laws and, consequently, that this segment of Title 28 U.S.C. 1865(b)5 should be declared by the Court unconstitutional and this question no longer asked. (Appendix this Brief, PP. 24a-25a, Statute cited)

There is another argument to be made here in the nature of a civil rights complain. Why should one under indictment be denied this privilege of jury service? No due process has been afforded the indictee. He has had no opportunity to be heard. Perhaps he did not even know the grand jury was in session. He had no right to present witnesses; yet, this act of the grand jury takes away his privilege of jury service. The foregoing points out the Summary judgment attached to the procedure. For this reason, it is wrong. However, Mr. TUNNELL was not called for jury duty. It is not this civil rights complaint that he makes; yet, this is another reason for the instruction not to be given by the Trial Court.

Mr. TUNNELL was singled out by the Trial Judge to the prospective jury panel, and this panel was told by the Court in effect that Mr. TUNNELL is the only person in this courtroom who is different from all of the rest of us. Everyone was eligible for jury service except Mr. TUNNELL. Is this really any different than representing a black defendant and having the Court

state to the panel "Is there anyone on the panel that is black? If so, you are disqualified from jury service." It is obviously prejudicial, and there is no real distinction between these two (2) analogies.

Just because this question has been asked by trial judges for a long period of time and is standard operating procedure does not give it validity in face of a clear objection with the opportunity of the trial court to act to prevent this denial of due process of law and equal protection of the laws.

In this case, the question is also compounded by the fact that in the closing argument of the Government, counsel for the Government indicated to the jury panel that Defendant was indicted by an East Texas grand jury (Transcript PP. 1034-1035); and upon this remark being made, a Motion for Mistrial was asserted and was by the Trial Court overruled.

No cases can be found in point; however, the logic seems irrefutable. The matter was properly preserved in Trial Court, presented to the Fifth Circuit Court of Appeals, and is now presented to this Honorable Supreme Court of the United States.

**QUESTION NO. TWO RESTATED**

THE COURT ERRED IN PRESENTING ITS CHARGE TO THE JURY IN TWO (2) REGARDS:

(A) THE COURT FAILED TO INFORM THE JURORS IN ACCORDANCE WITH REQUESTED IN-

STRUCTION BY DEFENDANT THAT THERE WERE ALTERNATE CIVIL REMEDIES AVAILABLE FOR COLLECTION OF TAX. WITHOUT THIS INSTRUCTION GIVEN TO THE JURORS, THEY ARE LED TO BELIEVE THAT EITHER THE MAN GOES SCOT-FREE, OR HE IS FOUND GUILTY, WHEN, IN FACT, THERE IS AN ALTERNATE METHOD OF CIVIL REMEDIES AVAILABLE FOR COLLECTION OF ALLEGED DEFICIENCIES OF TAX OWED TO THE GOVERNMENT.

(B) THE COURT ERRED IN ALLOWING EXHIBITS 257 and 258 (INCOME TAX RETURNS FOR 1963 AND 1964, NON-PROSECUTION YEARS) TO BE TAKEN TO THE JURYROOM ALONG WITH THE COURT'S INSTRUCTION AT PAGE 1058 OF THE TRANSCRIPT ALLOWING INTENT IN NON-PROSECUTION YEARS TO BE USED TO SUPPLY INTENT FOR SUBSEQUENT YEARS.

## ARGUMENT AND AUTHORITIES UNDER QUESTION NO. TWO

In requesting a charge informing the jurors of alternate civil remedies available to the Government for collection of tax (Transcript PP. 1072-1073), (Appendix this Brief, PP. 22a-23a), we used a direct quote from the *Spies case* (317 U.S. 492, 63 Sup. Ct. 364, 1943). The issue here is why should this information not be supplied to a jury. We find Circuit Court decisions and even Fifth Circuit decisions adverse to our contention. However, the request is not confusing; it is short and concise. The vast investigative powers of the Treasury

Department with trained agents working on the case for over twenty-four hundred (2,400) hours can cast doubt, inference and/or suspicion on any taxpayer in the United States. Isn't it fair play to let the jury know that it is not a "all or nothing" position?

The jury could conclude that Defendant needs to pay the tax but need not go to jail — that option is available under the law; why not tell the jury? There was evidence about the civil procedures and the report of Agent Bunt recommending only payment of back tax (Transcript P. 608, Defendant's Exhibit 23). The failure of the Court to include this requested charge gives the jury an incomplete review of the law. The charges could not have harmed the Government for this correct information to be available to the jury.

Perhaps this point is most important because each juror is a taxpayer. He has paid his taxes and wants to see the Defendant pay his if the evidence has raised *any* questions in the juror's mind. But, as phrased, the juror is faced with guilt and tax being paid; or not guilty and no mention of tax, i.e. incomplete and prejudicial to Defendant.

> "The time is rapidly approaching when surprise will be eliminated from the criminal trial and the sporting theory of justice will be a relic of the past for criminal defendants as it is already for civil litigants.' "[1]

---

[1]Brennan, "The Criminal Prosecution: Sporting Event or Quest for Truth", 1963, Washington University Law Quarterly, P. 279; Everett, "Discovery in Criminal Cases — In Search of a Standard," 1964, Duke Law Journal, P. 477.

Requests were made by counsel for Defendant for the special agents' reports. It is difficult to brief a matter and assert you are entitled to receive something when you do not even know what is contained therein. Counsel for Defendant also sought the name of possible Government witnesses which would attempt to link Defendant with alleged illegal income.

Of significance in these particular matters are the facts that the cross-examination of the revenue agents, Gann and Shelton, provided most of the basic defensive matters set out by Defendant. Agent Bunt had made a determination that the Defendant, RUSSELL TUNNELL, owed some additional tax; but he treated it as a civil matter. It is respectfully asserted that there should be contained in such report matters adverse to the Government's contention concerning willfullness and specific intent; i.e. evidence to negate bad or evil motive and at least a difference of opinion between Government agents concerning whether this should be a tax fraud case brought under the civil or criminal remedies. It is significant to note that the Government at one time was willing to have Defendant pay a sum of money which was brought out by a result of the errors made by Defendant's accountant. Special Agent Bunt was subpoened as a witness for the Government and remained in attendance throughout the trial. It was anticipated by Defendant that Bunt would be placed on the witness stand. It is respectfully asserted he was not put on the stand to preserve the secrecy of these reports. Not having seen the reports, we can only make the accusation. We seek of this Court a review of those reports and a projection as to whether or not

evidence contained therein would be beneficial to counsel for Defendant.

Agent Shelton made an admission about the knowledge of the sale of the motel in Galveston, i.e. the availability of non-taxable funds (Transcript P. 589); about the truthfulness of RUSSELL TUNNELL, i.e., lack of intent (Transcript P. 601); about RUSSELL TUNNELL relinquishing all of his records to the CPA (Transcript P. 592); about Defendant's method of keeping books on the motel being consistent with the accepted accounting principles (Transcript P. 592).

Can it be said that these admissions could not have been used by counsel to effectively cross-examine this agent or other agents? Can the Court see any reason for the failure to disclose these reports? Can it be judicially determined that counsel for Appellant, with many hours of investigative time, would not have been able to utilize to MR. TUNNELL'S benefit prior inconsistent statements?

In *Will vs. United States,* 389 U.S. 90, the Court was concerned with the issue of disclosure as is requested in the case at bar. It is a complicated case and perhaps Mr. Black in his concurring opinion sets forth the position of Defendant in this case, with the mandamus features in the *Will case* stripped aside:

> "In the present case, it is conceivable that there are valid reasons why the Government should not be forced to turn over the requested names and that compliance with the Order would inflict irreparable damage on

> their conduct of the case. The trouble here, as I see it, is that neither of the courts below gave proper consideration to the possible existence of exceptional facts which might justify the Government's refusal to disclose the names."

It seems we come back to the same argument again and again. Does the possible prejudice to the Government by the disclosure of the names of these witnesses relating to illegal income outweight the probable probative value of the preparation of Defendant's case by preventing surprise and allowing full-trial preparation for the matters for which he stands charged. (See Trial Brief; Transcript PP. 71-72; also Transcript PP. 189-194)

It appears that the probability of committing error prejudicial to the Defendant is far outweighed by the possibility that the Government would be harmed by disclosure of these names. Alternatively, however, as an officer of the Court, counsel for Defendant could have been instructed not to disclose privileged portions.

The basic issue is whether or not the rights to confrontation and cross-examination of the witnesses against you guarantee: (a) Will you only be given ten (10) minutes notice; or (b) Will you be given enough time to prepare a defense and secure evidence to controvert that which may be a complete surprise at the time it is offered?'

Admittedly, it is technical compliance for Mr. TUNNELL to be entitled to see who made testimony against him in open court; but with only ten (10) minutes notice, while such information is coming out on direct examination, there is very little time to prepare a meaningful cross-examination or to secure evidence to rebut any testimony that is given by such witness. In the case at Bar, here was a rank-stranger who did not even know the Defendant; and Mr. TUNNELL was not present at the time the witness testified about the occurrence (Transcript PP. 452-453). This cannot be due process.

*Marcus vs. U.S.*, 422 F.2d 752 (Fifth Circuit, 1970) is a tax evasion case where the Court reversed the decision of the Trial Judge primarily because she refused defense counsel's request to see the revenue agent's notes. It is also significant that the defense in the *Marcus case* had copies of the memorandums on which the notes were based prior to the revenue agent taking the stand. In that case, this Honorable Court said:

> "It is possible, however, that being unable to see the notes and examine Brandstettler (the agent) with them, the defense was unable to effectively inquire into whether Brandstettler was testifying on present recollection or whether the notes were being used erroneously as a past recollection recorded. Or whether the notes being used by both the examining counsel and the witness constituted

> a sort of script. These possibilities tend to lead to the conclusion that the error here effected the substantial rights of Marcus and demands a reversal, but when taken cumulatively with other errors in this case, this conclusion need not be reached. Upon retrial of this case, the District Court should exercise great caution to see that these trial notes are not misused."

We seek relief for Defendant in this instance; but in raising this point as an issue, we must rely on the conscience of this Appellate Court in determining whether or not due process has been denied Defendant by not allowing his counsel this information.

**QUESTION NO. THREE RESTATED**

THERE WERE CUMULATIVE ERRORS COMMITTED IN THE TRIAL OF THIS MATTER WHICH PERHAPS IN AND OF THEMSELVES ARE NOT SUFFICIENT TO OVERTURN THE CONVICTION; HOWEVER, WHEN THE TOTALITY OF THE CIRCUMSTANCES IS REVIEWED WITH THE FOLLOWING ERRORS POINTED OUT TO THE COURT, IT IS RESPECTFULLY ASSERTED THAT THE PROBATIVE VALUE OF THE TESTIMONY AND ERRORS BALANCED AGAINST THE PREJUDICIAL EFFECT PROBABLY CAUSED THE RENDITION OF AN UNJUST VERDICT AND PENALTY IN THE FOLLOWING REGARDS:

A. DEFENDANT WAS DENIED THE NAMES OF THE WITNESSES BEFORE TRIAL TO BE CALLED

BY THE GOVERNMENT RELATING TO ALLEGED ILLEGAL ACTIVITIES AND INCOME. DEFENDANT REQUESTED SUCH NAMES IN A PROPERLY FILED MOTION FOR BILL OF PARTICULARS.

B. EVIDENCE WAS ADMITTED OVER OBJECTION OF DEFENDANT OF PROSTITUTION INCOME AND KITING OF CHECKS, BOTH MATTERS BEING HIGHLY PREJUDICIAL BUT NEITHER OF WHICH AFFECTED DEFENDANT'S TAXABLE INCOME.

C. THE GOVERNMENT, OVER PROPER OBJECTION BY DEFENDANT, WAS ALLOWED TO HAVE ITS FRAUD AGENT STATE THE CONCLUSION THAT HE HAD RUN DOWN ALL LEADS FURNISHED BY THE DEFENDANT WITHOUT BEING SPECIFIC.

D. THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTIONS FOR JUDGMENTS OF ACQUITTAL AS A MATTER OF LAW.

## ARGUMENT AND AUTHORITIES UNDER QUESTION NO. THREE

A net worth tax fraud case tried in 1973 has only the guidelines set out by the Supreme Court of the United States in the now 30-year old case of *Spies vs. U.S.* and the 20-year old case of *Holland vs. U.S.* It has been this long before this Honorable Court had made a definite pronouncement on how a net worth tax fraud case should be handled. The Circuits have

floundered among themselves concerning the basic requirements of balancing the equities between the Government and the proper exercise of its function in collecting tax and prosecuting under the criminal sanctions of the law those who willfully intend to evade and defeat tax, and the taxpayer who owes tax but need not be prosecuted criminally. Will the Supreme Court in this case set forth some definite guidelines for not only the Internal Revenue Service but the Trial Judges, the Court of Appeal Judges, and perhaps most importantly for the future individuals so unfortunate to be named defendants in tax fraud cases? What once began as a small leak in that dike of due process allowing the "net worth" method of proof to be used in rare and unusual circumstances (against gangsters like Al Capone) has now become a steady stream of cases prosecuted by the Internal Revenue Service on a regular basis against John Q. Taxpayer. If this Honorable Supreme Court of the United States does not repair this established procedure now being instituted by the Internal Revenue Service, our once cherished "presumption of innocence" will soon be washed far down stream.

Should this Court fail to discriminate between the validity of mutually beneficial holdings of allowing net worth prosecutions in the past under stringent conditions and the present wholesale endorsement of the inclusion in the record of any and all evidence in net worth prosecutions, it is going to cause a hardship on both the trial and appellate courts. Future cases (and there will be many of them) will have to be tried and appealed with the consequent expense and delay un-

less this Honorable Court sets down firm and decisive guidelines by a decision in this case on what can and cannot be admitted into evidence in net worth prosecutions and whether or not the Court meant what it said in *Holland* by its special instructions to the Court of Appeals in net worth prosecutions at Page 129 of that opinion:

> "Appellate Court should review the case, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

In the years following the *Holland Case* not many "net worth" cases were tried. However, the trumpets in Holland are now silenced by over twenty (20) years of time and the Government continues to make inroads into the safeguards there outlined and spelled out specifically by this Honorable Court. *U. S. vs. Bishop*, 93 S.Ct. 2008 (1973) settles for everyone the lesser and included problem. This is a particularly pertinent case for the Court to reverse with a firm decision concerning the rules of tax fraud prosecution and the establishment of guidelines for the Government in deciding which cases to prosecute and to aid and assist attorneys in deciding the admissibility of evidence in these kind of cases. Since *Holland*, the Court has not set down any specific guidelines or yardstick by which either litigants, the Government or the taxpayer can judge the propriety of the Court's action in the Trial of these cases. They simply must litigate their case and appeal each one of them and let each case be

decided with no help to future litigants or for future planning. At Page 151 of the Court of Appeals Opinion, the Court agrees with the Government's summary witness in determining that defendant owed $829.43 in additional tax. Then, at Page 152 of the Opinion, the Court admits that TUNNELL probably received $2,000.00 in nontaxable income in the year 1965. Consequently, this Court has held that $829.43 of tax due can supply that requisite "evil intent" for a tax fraud prosecution but that a $2,000.00 error in the Government's calculations in that same year to arrive at the tax does not create reasonable doubt. The Government in this case used "prostitution income" as its springboard for a "likely source" in its attempt to prove tax fraud. However, the Fifth Circuit and the Government must be consistent in their positions taken. If they are going to believe what the taxpayer tells them, i.e. statement to the Revenue Agent that he had prostitution income, then to be consistent they must believe that he reported his lounge income (it is all in the same sentence — Transcript P. 396). In addition, the same Agent making this testimony agreed that he audited the books and found the distinctions and differences between the lounge income and "prostitution income" to be insignificant. (Transcript PP. 764-765) Again, if we are going to use what the Agent says, and he has made many statements about how MR. TUNNELL told him the truth, did not mislead him, i.e. evidence of good motive and good intent (direct evidence), how can the Government be allowed to infer willfulness and evil motive in the face of its own direct evidence of good intent and good motive? (Transcript PP. 601; 733-734; 742; 744-746; 754-761) The effect of this opinion as writ-

ten allows the Agent to state that the "prostitution income" was insignificant and yet the Court uses it (prostitution income) as the basis for the likely source of $98,000.00 of income. The positions are inconsistent.

On a broader scale than the individual case and the individual errors heretofore pointed out, the reason we implore this Court to reverse the decision of the Fifth Circuit is because this is a classic example of the erosion of the safeguards set forth in *Spies* and *Holland*. From the Government's standpoint, an analysis of the TUNNELL case gives them the exact formula they need for securing a conviction in every tax fraud case presented:

1. The fraud agent must attribute statements to the defendant, and the Court and jury will never know whether it was a leading question, a direct question and answer session, or whether it is a short rendition of the agent's belief in the matter;

2. Ask an all-encompassing question (Did you run down all the leads furnished to you by the taxpayer?) The Fifth Circuit has placed its stamp of approval on what was intended by the original pronouncement in *Holland* to be one of the cherished safeguards of the accused. (P. 129, *Holland* opinion) This leading question and conclusion of the witness was objected to and overruled by the Trial Court (Transcript P. 766):

3. The case needs to be spiced up with a little extra activity such as prostitution whether or not it makes any difference in the taxable income of the accused

— it certainly will help the jury and the Court lean toward conviction (Transcript P. 766).

4. Ask the prospective jurors whether or not they are under an indictment at time of voir dire examination and in closing argument make certain that the jury remembers that this defendant was indicted by a local grand jury (Transcript P. 1034).

5. $829.43 in a one (1) year period is enough tax owed so that an inference is cast upon the accused rebutting his once-famous "presumption of innocence" so that now he is presumed to have evil intent; and this much tax by the Fifth Circuit Opinion has now been judicially declared to be an understatement of "large amounts of income".

6. Do not allow the jury to know that inferences equally consistent with innocence as with guilt are to be resolved in the taxpayer's favor. He properly requested his instruction prior to the Court's charge (Transcript P. 1066).

7. Do not inform the jury that there is an alternate method of collecting tax or asserting penalties against the accused for collection, other than a severe criminal punishment (Transcript Request for Charge, P. 1068).

8. Do not allow the Defendant the name of witnesses to be used against him even if these witnesses are complete strangers and are going to assert Defendant has earned income from illegal sources. (Motion for Bill of Particulars overruled, Transcript P. 155).

9. Do not allow Revenue Agent or Special Agent reports to be used for cross-examination (In camera inspection involved with Court of Appeals as a Sealed Exhibit).

10. Allow even non-prosecution year tax returns to be taken to the jury room with an instruction that any year's intent can be used, even though the Defendant is not indicted for those years (Transcript).

In all due respect to the Trial Court, Court of Appeals and to this Honorable Court, these itemizations are not intended as sour grapes. We tried the case both at the Trial level, the Court of Appeals level and are now submitting it to this Honorable Court for its exercise of discretion in whether or not to grant a Writ of Certiorari. It is respectfully asserted that if this Honorable Court does not review this case and reverse on at least the cumulative error point, our system of justice in the area of net worth tax fraud prosecutions has now gone beyond that stage which at one time seemed impossible by the clear pronouncements of the *Holland Case* as cited with approval with the Fifth Circuit in the *Flemister Case*.

It is not asserted for one minute that the accused nor his counsel has been mistreated by any of the Judges of the Courts heretofore reviewing this matter and nothing personal is intended by any of the comments made herein. However in all due respect to the prior reviewing Courts, this is a specialized area of the law that the government continues to chip away procedural safeguards in such an orderly fashion that

all of the sudden, twenty (20) years later, the *Holland Case* is no authority whatsoever, because the rules simply are not in 1973 what this Supreme Court said the rules were in *Holland* and *Spies*.

By analogy, if ninety (90%) per cent of the bricks in a building are placed there in a good and workmanlike manner, but ten (10%) per cent or possibly the foundation of such structure are incorrectly placed, the building would be unsafe and the parties will have a reasonable doubt about whether or not such structure should be occupied. It is a tough task for a building inspector to condemn a new building that has a lot of time, effort and materials in it, but if in truth and in facts, the building is not safe for occupancy or, if he has a reasonable doubt thereof, he should not place his stamp of approval on such structure. Would you believe that some of the bricks used in building this case i.e. lack of intent, prejudicial evidence of prostitution, stacking of inferences on inferences have been improperly used as mortar to secure this conviction. These defects in the case existed at the time the Government closed its case in chief and they existed at the time they jury was sent to the room to deliberate. Motions for Judgments of Acquittal were made at all three (3) stages of the Trial.

We are here only to represent our client, however; in so doing, we possibly are called on to represent the future accused individuals in tax fraud cases in requesting this Honorable Court to set forth future guidelines. To allow the Trial Judge to ask members of a prospective jury panel about disqualifications of jurors

in the event they are under indictment is erroneous. To allow a Trial Judge to overrule any Motion for Judgment of Acquittal and put the Defendant to the jeopardy of relying on Appellate remedies for presenting evidence is error. Stacking inferences on inferences is error. Using evidence of prostitution when it does not affect taxable income is error. To be able to infer bad intent when good intent is directly testified about, is error. We sincerely believe these bricks used in securing this conviction should by the Court cause these structural defects to be pointed out and a blueprint for net worth prosecutions in the future be outlined by this Honorable Court's Opinion when it reverses this case.

It is always difficult to show how errors committed have prejudiced the Defendant, perhaps, however; in this case, at Page 1104 of the Transcript, the Trial Judge some four (4) weeks after the Trial, still had prostitution evidence in this mind at the time he sentenced the Defendant (Brief Appendix P. 15); *even though the Agent had testified in the Trial that this source of income was insignificant*(Brief Appendix P. 17). Somehow that is hard to explain to a client who now has four (4) years to serve and it appears now very significant. *Armes vs. Commissioner*, 448 F.2d 972 (Fifth Circuit, 1971) is directly in point and should be basis alone for reversal.

There is a conflict of the circuits about whether or not the Motion for Judgment of Acquittal should be renewed by the Appellate Courts at the close of the Government's case or whether, after the Defend-

ant proceeds to put on evidence in his behalf, the entire case must be looked to to determine the propriety of the Motion for Judgment of Acquittal. Better logic and rational it appears is found in "Phillips, the Motion for Acquittal, a Neglected Safeguard" (1971) 70 Yale Law Journal 1151. What we seek is this Court granting the Motion for Judgment of Acquittal made by the Defendant at the close of the Government's case. It is simply inconceivable that in 1972, a citizen could be indicted for income tax evasion and then tried and convicted on hearsay evidence for prostitution (Transcript PP. 444-456). When its immateriality and irrelevancy were established by the Government, we made a motion to strike this testimony concerning prostitution and checkkiting. It was apparent that it did not affect his tax liability and at the time we pointed this out to the Court and made the Motion, we argued in detail the nature of the Motion and why the evidence was not sufficient to sustain a conviction. (Transcript PP. 810-815).

The irrelevance of the evidence offered is one reason to reverse the Trial Court. *Blumberg vs. U.S.*, 22 F.2d 496 (Fifth Circuit, 1955). *Ginsberg vs. U.S.*, 257 F.2d 950 (Fifth Circuit, 1958). The intentionally created prejudicial effect of the evidence is another. *Massei vs. U.S.*, 241 F.2d 895 (First Circuit, 1958) (Affirmed 445 U.S. 595; 1958). A Fifth Circuit Case which it seems should be controlling on the Court of Appeals concerning our facts of the case at bar, is found in *U.S. v. Schorr*, 462 F.2d 953 (Fifth Circuit, 1972) at Page 959:

> "In a circumstantial evidence case one inference cannot be founded upon another to sustain a conviction. See *Dyrth vs. U.S.*, Eighth Circuit (1964), 327 F.2d 917; *Wesson vs. U.S.*, Eighth Circuit (1949), 172 F.2d 931. Furthermore, the facts must be consistent with every reasonable hypothesis except that of guilt. See *Triangle Club, Inc. vs. U.S.*, Eighth Circuit (1959), 265 F.2d 829; *Salinger vs. U.S.*, Eighth Circuit (1927) 23 F.2d 48."

In the case last cited, the Court held that where all the evidence is as consistent with innocence as with guilt, it is the duty of an Appellate Court to reverse a Judgment of conviction against the accused. (Citing authorities).

This Court held in *Montoya vs. U.S.*, Fifth Circuit (1968) 402 F.2d 847 at Page 850:

> "In order to sustain a conviction in circumstantial evidence cases, the inferences to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence. Citing *Vick and also Duncan vs. U.S.*, 357 F.2d 195, Fifth Circuit (1956).
>
> The inferences to be drawn from the evidence in this case are not inconsistent with every reasonable hypothesis of innocence; and considering them in the light most favorable to the Government, which we must do, they are as

> consistent with innocence as with guilt. Under such circumstances, the Government has failed to prove the Appellant's guilt beyond any reasonable doubt and to a moral certainty as required by law to sustain their convictions. We conclude that there was insufficient evidence to prove the conspiracy charge in the indictment . . . . the judgment of conviction as to each Appellant is therefore reversed and rendered with directions to the District Court to enter Judgment on Acquittal."

The basic element missing in the Government's case, if we had to single out one cause for the Judgment of Acquittal, is that of "intent". When the intent required for a conviction is knowledge or willfulness as properly defined by the Court in his charge and the record is viewed in the light most favorable to the Government with these definitions in mind, there is no substantiating evidence to support his conviction. It is respectfully asserted that the entire conviction rests solely upon the "magic of figures" presented by a summary witness and the prejudicial testimony of illegal activities improperly allowed to be admitted before the jury. See *Holland vs. U.S.*, 75 S.Ct. 127.

With willfulness, knowledge and specific bad motive under the microscope, we think the decision in *U.S. vs. Newman*, 468 F.2d 791 (Fifth Circuit, 1972) is very important to Defendant in the case at bar; and we quote as follows:

> "It is clear that making false statements to Treasury Agents for the purpose of conceal-

ing income constitutes a sufficient affirmative act to satisfy Section 7201, citing *U.S. vs. Beacon Brass Co.* 344 U.S. 34 . . . Lying was also an integral part of his evasionary modus operandi"

No one quarrels with this law, and the Government is allowed to prove willfulness by lying; conversely then, the other side of the coin should apply. The Government disproves or negates willfulness in its numerous admissions of Defendant, RUSSELL TUNNELL, telling the truth. (Transcript P. 731).

"Q (Mr. Tyner) Mr. Gann, in connection with interviews you had with Mr. Tunnell, he essentially at your reques provided you with all his records and all of the information which he had regarding his records, did he not?

A. (Mr. Gann) All he said he had, yes, sir.

Q Well, he answered all of your questions, did he not?

A Yes, sir.

Q Did you ever go back after having been told by Mr. Tunnell the facts which you have recited here in testimony and which are recorded in the memorandum of interview which you had with him, did you ever find it necessary to go back to Mr. Tunnell and ask him over again about a fact that he had misrepresented to you?

A I didn't go back and ask him about anything, no, sir.

Q You never found the need to go back and ask him about any fact which he had misrepresented to you in these interviews?

A Well, I found nothing he had misrepresented about his records.

Q That's what I am talking about. He essentially just poured it out and gave you everything he had.

A Well, if he had it, he gave it to me.

Q As far as you know, he gave you everything he had.

A As far as I know, yes, sir.

Q As far as you know, he told you the truth every time you asked him a question.

A As far as I know.

Q And aren't you able to know at this time that everything he told you and everything he showed you was against his best interests?

A Perhaps.

Q Got a lawsuit over the very items he disclosed to you, have we not?

A Oh, yes, sir, plus others.

Q The lawsuit could not have been prepared in the fashion it has been presented to this Jury without Russell Tunnell's assistance and truthful answers to your questions.

A Perhaps.

Q Mr. Gann, do you know from having accumulated the information how many hours you have worked on this case?

A It would have to be a guess.

Q All right, sir.

A Somewhere around twenty-three or twenty-four hundred hours.")

These theories of why the Motion for Judgment of Acquittal should have been granted and the impropriety of the Court's ruling in allowing the prostitution evidence to be admitted are somewhat interwoven. Moving now to the evidence we assert to be prejudicial, the Court must be made aware of the fact that on Defendant's tax return he reported income from the alleged prostitution as "lounge income". Defendant was perfectly consistent with his privilege against self-incrimination in putting down on his tax return the prostitution income. The fact he labeled it "lounge income" rather than "prostitution income" is consistent with his not being willing to incriminate himself on his tax return. We are not making a "Leary argument", but we are using the theme in the Marchetti, Grosso and Hayes cases, (See *U. S. vs. Marchetti,* 390 U.S. 39; *U.S. vs. Grosso,* 390 U.S. 62; and *U.S. vs. Hayes,* 390 U.S. 85) in showing that the Government recognizes that with regard to the prostitution income he answered the question honestly in reporting the correct amount of income; consequently, any evidence of prostitution could be used only to inflame the minds of the jury and it could not be used in any way whatsoever to prove the counts in the indictment concerning evasion of tax. It is significant to point out that the constitutional privilege against self-incrimination was intended to shield the guilty and the improvident as well as the innocent and farsighted. Assuming without deciding that Defendant was engaged in the business of prostitution, he does not have to disclose this informa-

tion on the tax return, if, in fact, he discloses the correct amount of tax on the return. Mr. Gann, the Special Revenue Agent, looking into this matter for some twenty-three or twenty-four hundred hours, agreed that the amount of the difference between what he asserted to be "prostitution income" and our reporting of "Lounge income" was INSIGNIFICANT. (Transcript, PP. 764-765). Perhaps the matter we are trying to show the Court at this point is most succinctly stated at Page 734 of the Appendix wherein Mr. Tyner was examining the Revenue Agent:

"Q In any event, you can ascribe no bad faith to Mr. Tunnell in connection with your investigation of this case?
A That depends.
Q He didn't tell you any stories, and he didn't furnish you any false information, did he?
A Well, there were a couple of questions he wouldn't answer.
Q Well, he didn't tell you a lie about them. He just refused to answer them.
A He just wouldn't tell me.
Q All right.
A And I am trying to recall — well, he may have given me some misinformation.
Q You don't think he gave you any misinformation intentionally, do you?
A I have no reason to believe he would."

When this testimony is taken together with the testimony that the records were available for the accountant and the accountant prepared the occupancy tax

returns for the State of Texas and simply made a gross error in such preparation that amounted to an understatement of income (Transcript PP. 655-660), and the fact that Defendant signed the tax returns in blank (Transcript P. 742), and the fact that Defendant reported money he received from selling eggs (Exhibit 3), it appears uncontroverted that the evidence is equally consistent with innocence as with guilt. With this yearstick, with this measure, and with it being required in a net worth and expenditures type case that the Court consider these cases with the admonishment given in *Spies* and *Holland* "that figures sometimes have a way of becoming relevant all on their own without any intent or motive being proved at the time such figures are being established", then Defendant, RUSSELL TUNNELL, is the victim here rather than the United States Government. The crime here being perpetrated is one against an individual rather than against society. How can he be guilty of willfully intending to evade taxes when he signs the return in blank, the accountant makes a gross error, and even makes the admission (Transcript PP. 632-684) that the accountant made the decision to file it that way anyway.

Perhaps, however, the emasculation of the *Holland Case* is best found at Page 766 of the Transcript, the Government on cross-examination asked this question:

"Q. Mr. Gann, during the course of your investigation did you attempt to run down every lead furnished to you by the Defendant?

A. Yes, sir, I did.

MR. TYNER: We object to that as calling for a conclusion on the part of the witness, Your Honor, and unless he's able to ask him about specific leads and specific efforts he made to run down those leads.

THE COURT: Overrule the objection."

Here is an essential element of the case; that the Court charges the jury must be carried out by the Government. He has just been cross-examined about leads he did not run down. Then over objection of counsel, the Government is allowed to patch up this hole in their case with a conclusionary statement brought to the attention of the jury because such inadmissible question was asked and by the Court overruled.

It appears we have a Jeckle and Hyde argument here made by the Government. They prove up a mountain of figures, exhibits, possibilities and inferences on which they then pile bad faith and evil motive in order to secure a conviction. It is easy to reach these conclusions. However, when the specifics are asked about as in Transcript Page 757 wherein again on cross-examination we were asking about the truthful information given to the Revenue Agent by Mr. Tunnell, and it was said:

"Q. You accepted his word, made no further inquiry.
A. Right, that is true."

They accept the man's word, believe what he tells

them, attribute no bad faith to him and yet compile a series of figures put together by what now appears to be an incompetent accountant who had little to no experience and who made gross errors that are now admitted. These facts simmered over twenty-four hundred hours of investigation time by an experienced revenue agent, salted and seasoned with a little prostitution testimony, argued to an East Texas jury and stirred frequently by qualified and skilled Government lawyers, has now cooked MR. TUNNELL. He has four years to serve in the Penitentiary. This Court will be the last opportunity that MR. TUNNELL, the Defendant herein, will have to keep this recipe from being printed and served. An attempt at humor is not here made. I am simply pointing out to this Honorable Court that you can start with the basic ingredients and handle the matter in different ways and secure a different end result.

We are sincere in our belief that the Motion for Judgment of Acquittal should have been granted. Even though particular errors might not require a reversal in and of themselves, the cumulative effect is to deny the Defendant a fair trial; and the judgment of conviction should be reversed. *Baines vs. U.S.*, 426 FF.2d 833 (Fifth Circuit, 1970); *Marcus vs. U.S.*, 422 F.2d 752 (Fifth Circuit, 1970).

All of the reasons listed above are, therefore, most strenuously urged as basis for this Court's exercise of discretion in the granting of the writ.

Respectfully Submitted,

TYNER, BAIN & TYNER
237 South Broadway
Tyler, Texas 75701
A/C 214/593-8284

JERRY BAIN

RAMEY, FLOCK, HUTCHINS,
GRAINGER & CARROLL
P. O. BOX 629
Tyler, Texas 75701
A/C 214/597-3301

MICHAEL A. HATCHELL

**CERTIFICATE OF SERVICE**

I hereby certify that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed, postage prepaid, air mail, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and three (3) true and correct copies of same to Mr. Roby Hadden, United States Attorney, Federal Building, Tyler, Texas 75701, postage prepaid, this the ____ day of December, 1973.

JERRY BAIN

**APPENDIX 1**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 72-3787

---

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
PERRY RUSSELL TUNNELL,
Defendant-Appellant.

---

Appeal from the United States District Court for the Eastern District of Texas

---

(July 18, 1973)

---

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

AINSWORTH, Circuit Judge: Perry Russell Tunnell was convicted on each of three counts for willfully attempting to evade federal income tax during the years 1965, 1966, and 1967, in violation of 26 U.S.C. § 7201 (1970).[1] The central issue on appeal concerns

---

[1]Section 7201 reads as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or

the sufficiency of the Government's evidence based on the net worth method. We affirm.

I.

One of the essential elements which the Government had to prove was that taxpayer owed tax on at least some unreported income for each of the three years named in the indictment. Because taxpayer's records were inadequate, the Government utilized the so-called "net worth method" described and approved in the leading Supreme Court case of *Holland v. United States*, 348 U. S. 121, 125, 75 S.Ct. 127, 130 (1954):

> In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability attempts to establish an "opening net worth" or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these

---

the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than 10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution.

> increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of "conduct the likely effect of which would be to mislead or to conceal." *Spies v. United States,* 317 U. S. 492, 499, 63 S.Ct. 364, 368, 87 L.ED. 418.

*See also United States v. Newman,* 5 Cir., 1972, 468 F.2d 791, *cert. denied,* —— U. S. ——, —— S.Ct. —— (1973) [41 L. W. 3516]; *Lee v. United States,* 5 Cir., 1972, 466 F.2d 11. In the present case the Government determined the correct taxable income and tax to be the amounts set out below, compared to the taxable income and tax actually reported by Tunnell in his returns, as follows:

| | Government Determination | | Tunnell Reported | |
|---|---|---|---|---|
| *Year* | *Income* | *Tax* | *Income* | *Tax* |
| 1965 | $ 9,236.73 | $ 971.55 | $ 181.52 | $ 142.08 |
| 1966 | 35,579.77 | 5,942.14 | 2,241.98 | 113.33 |
| 1967 | 34,783.42 | 7,738.31 | (20,864.68) | —0— |

To rely on determinations of income by the net worth method, it was necessary that the Government establish Tunnell's opening net worth at the start of 1965 with reasonable certainty, introduce evidence supporting the inference that his net worth increased due to currently taxable income, and negate all reasonable

explanations and leads furnished by Tunnell which were inconsistent with guilt. *See Holland,* 348 U. S. at 132, 135, 137, 75 S.Ct. at 134-36. In examining the record we find that the Government sustained its burden.

Based on a detailed financial analysis, the Government determined Tunnell's assets on December 31, 1964 to be $57,686.89, including cash on hand, cash in banks, the Pines Motel and Trailer Park, some farm land he inherited, mobile homes, automobiles, trucks, and deferred expenses. But he had offsetting liabilities of $64,447.55, so the Government set his opening net worth at a deficit of $6,760.66, which we find to be fully supported by the record. Counsel for taxpayer objected to the Government's introduction into evidence of tax returns for 1962, 1963, and 1964, and when the jury during its deliberations requested the 1963 and 1964 returns, counsel also objected to the district judge's allowing the jury to see the returns again. These returns were admissible and could be viewed by the jury at its request, because the small amounts of income reflected in these returns were relevant to corroborate the asserted deficit net worth as of December 31, 1964. The returns consistently showed the taxpayer had little income during the prior three years. Furthermore, the district judge gave the jury a proper limiting instruction that the documents could only be considered for the limited purpose of determining Tunnell's opening net worth.

The Government showed that the likely source of Tunnell's net worth increases was from taxable income, as opposed to exempt income, by showing that he could have had income from the Pines Motel other than that reported. Appellant objected to testimony that this motel, in addition to providing the taxable income generally expected, also provided Tunnell with an opportunity for income from prostitution activities. This was necessarily admissible to fulfill the Government's responsibility under *Holland* of showing a likely source for the unreported income over the three-year period. Tunnell, himself, volunteered the information to a Government agent that he had two to four girls working for him during all three years of 1965 through 1967 and that he made as much as $12,000 from their prostitution in one year.[2] This income was taxable even it it was unlawful. *See James v. United States,* 366 U.S. 213, 219, 81 S.Ct. 1052, 1055 (1961).

The only leads furnished by taxpayer as inconsistent with guilt were that he had available $20,000 to $21,000 from the sale of a motel in Galveston during the prior tax year of 1964, that he "floated" checks, and that he borrowed money to live on during the years 1965 through 1967. The sale of the motel was reported on his 1964 return as a loss, and the correctness of that return was not disputed by the Government. Thus no tax was due on the proceeds received from the sale at an amount less than the basis. But contrary to ap-

---

[2]This evidence thus differs from that presented in Armes v. Commissioner, 5 Cir., 1971, 448 F.2d 972, 975-76 n. 2, where the evidence of prostitution activities never reached beyond suspicion and innuendo.

pellant's assertion in his brief that he had $20,000 available as a result of the sale, testimony by one of two other people with interests in the motel indicates that a promissory note of about $15,000 had to be paid after the sale and the remaining $5,000 from the sale was divided among three people, so that Tunnell probably got less than $2,000.

"Floting" checks was defined as writing a check in excess of the amount in the bank account but then depositing money from another account in time to cover the check. Evidence indicates that Government agents thoroughly reviewed Tunnell's assets and liabilities and bank accounts to negate either his borrowing money or his floating checks as sufficient to account for the net worth increases.

II.

As inferred by the Supreme Court from the words "willfully attempts" in the statute, the second and third necessary elements for conviction are evil motive by the defendant Tunnell and an affirmative act to carry out his scheme to evade tax. *See* 26 U.S.C. § 7201 (1970); *Spies v. United States,* 317 U. S. 492, 63 S.Ct. 364 (1943). *See generally United States v. Bishop,* ____ U. S. ____, ____ S.Ct. (1973) [41 L.W. 4765]. Here the consistent pattern of understating large amounts of income coupled with evidence of inadequate records kept by taxpayer permits an inference of willfulness sufficient to create a jury question. *See generally Holland, supra,* 348 U.S. at 139, 75 S.Ct. at 137; *Holbrook v. United States,* 5 Cir., 1954, 216 F.2d 238, *cert. denied,*

349 U. S. 915, 75 S.Ct. 605 (1955) The requisite affirmative act can be found in the filing of false tax returns for each year of the indictment.

Appellant raises several other points which we have considered and find to be without merit.

AFFIRMED.

---

**APPENDIX 2**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 72-3787

---

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

PERRY RUSSELL TUNNELL,
Defendant-Appellant.

---

Appeal from the United States District Court for the Eastern District of Texas

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 18, 1973, 5 Cir., 1973 ____ F.2d ____).

---

(October 31, 1973)

---

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure, Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

**APPENDIX 3**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3787

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

PERRY RUSSELL TUNNELL,
Defendant-Appellant.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including November 30, 1973, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of

the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ROBERT A. AINSWORTH
UNITED STATES CIRCUIT JUDGE

---

**APPENDIX 4**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

October Term, 1972

---

No. 72-3787

---

D. C. Docket No. 7189
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PERRY RUSSELL TUNNELL,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed

July 18, 1973

Issued as Mandate:

---

**APPENDIX 5**

[777] MR. TYNER:

Your Honor, there was one matter earlier in the trial that we had need of making a record of, Your Honor, and we had the understanding that it would be deemed accomplished at that time and do it at a later time. It had to do with a Motion with regards to interrogation of the Jury. I will be glad to put that in written form.

THE COURT:

Well, go ahead and proceed now. I'm ready to hear you.

MR. TYNER:

It will take me a minute to find that item maybe, Judge.

THE COURT:

Incidentally, for the benefit of the record there have been two items from the Government's files which have been perused by the Court in chambers without the presence of any of the attorneys in the case. I'm going to seal both of these items, which I do not have before me at this moment, but one of them was the referral report and the other was the — I forget how it was entitled.

MR. SLIVAK:

Special Agent's report.

THE COURT:

Special Agent's report. I'm going to seal those and make them a part of the record so that if there should be an appeal in this case, the Fifth Circuit would have the opportunity of [778] examining the documents if they chose to do so.

MR. TYNER:

Thank you, Your Honor. Now comes the Defendant, Perry Russell Tunnell, after the Court has qualified the Jury panel and moves the Court —.

THE COURT:

One moment.

(REPORTER'S NOTE: A juror comes from the jury room, and the Marshal returns to the jury room with the juror.)

THE COURT:

I think the Jury is going to want the exhibits.

THE MARSHALL:

They have a question. They are writing it out.

MR. TYNER:

— moves the Court prior to commencement of trial and prior to the commencement of voir dire examination of the panel to quash the panel because the Court has inquired of the panel as a body whether any member thereof has a charge pending against him for the commission of a crime punishable by imprisonment for more than one year or question of a similar meaning or connotation, inquiring thereby of the prospective jurors whether or not they are presently under indictment, for the [779] following reasons and upon the following grounds:

(1) Defendant, Perry Russell Tunnell, is guaranteed under the laws and Constitution of the United States and the amendments thereto, particularly Amendment No. 6 of the United States Constitution, the right to a trial by an impartial Jury; the Court having inquired of this panel from which the jurors will be selected to try the case of Perry Russell Tunnell, as indicated above, that is, whether any member has a charge pending against him for the commission of a crime punishable by imprisonment for more than

a year, tends to prejudice prospective jurors that an indictment must have a stigma attached to it when such an inquiry, instruction or qualification by the Court, in effect, rebutted the Defendant's presumption of innocence, and such inquiry, instruction or qualification by the Court gave authenticity or credence to the present criminal charge made by the indictment of the Defendant on trial and informed the panel and the prospective jurors contained therein that although the Defendant may be presumed innocent, he is known to be disqualified as a juror, and thereby such instruction was highly prejudicial to the rights of the Defendant.

[780] (2) It is anticipated by the Defendant in the course of the trial of the lawsuit and/or at the conclusion thereof the Court may give instructions to the Jury in the form of a charge which will contain information or statements substantially as follows:

That the indictment in this case is no evidence or indication of guilt and cannot be so considered by the Jury, and that the giving of such an instruction conflicts with the prior inquiry or the inquiry which has just been made of the Jury panel with regard to whether any member thereof may stand so charged for the reason that such inquiry together with the subsequent anticipated charge of the Court or instructions during trial are contradictory and will work to the prejudice of the Defendant in the minds of the jurors by confusion of the jurors as to what the law may be as respects the Defendant, Perry Russell Tunnell.

The Defendant respectfully asserts that such inquiry of the prospective jurors, that is, the panel, about whether or not they are presently under indictment, is a violation of the Fourteenth Amendment of the Constitution of the United States in that it deprives the Defendant, Perry Russell [781] Tunnell, due process of law and denies him equal protection of the law, and for the further reason that the panel being the subject of such inquiry immediately has been informed that a defendant and in this particular case, Perry Russell Tunnell, would not be qualified to serve on a Jury in such a case.

Respectfully and timely submitted by the Defendant, Perry Russell Tunnell, and by the Court:

THE COURT:

The Motion of the Defendant to quash the jury panel — I believe that's the —

MR. TYNER:

Yes, Your Honor.

THE COURT:

— is denied.

* * * *

---

**APPENDIX 6**

[5] MR. TYNER:

Please the Court, I would like to present at this time the motion of the Defendant, Perry Russell Tunnell, which we have filed as of October 30th, 1972, wherein

we ask that the Court not qualify the Jury panel or any member of the Jury panel singularly with questions as to, in substance, whether or not any such person has a charge pending against him for the commission of a crime punishable by imprisonment for more than one year, and our reasons or grounds are set out in the motion, Your Honor, and briefly the grounds are, which we urge in connection with this motion, that in the commencing of this lawsuit, as in other criminal lawsuits before this Honorable Court, panel members are going to be interrogated as to whether any member may stand charged with a crime. They will be informed also early in that connection that Perry Russell Tunnel stands charged with a crime before this Court, and in the ordinary [6] course of qualifying a Jury it probably will occur that the Jury will learn or the panel will learn that a person who stands charged with a crime punishable by imprisonment of more than one year is not qualified to serve on a Jury panel or on a Jury, although there will be admonitions to the panel members and eventually to the Jury that an indictment cannot be considered as any evidence of guilt on the part of a person charged in this Court. It is our contention that such an instruction contradicts or, at least, becomes confusing in connection with having already been informed and learned in this Court that if a person is charged with a crime he can't serve on a Jury.

We say that it violates the constitutional rights of the Defendant and denies him of due process and equal protection of the law and that the law or the rule requiring the qualification of the Jury in that respect

is unconstitutional, and we urge in this motion and in connection with the motion that making such a qualification will prejudice the rights of the Defendant in the eyes of the prospective Jurors and those that are eventually selected to serve on the Jury. They will know, for instance, that Russell Tunnell, the [7] indicted person, is not qualified to serve on a Jury panel, for instance, in a case involving some third person or even a member of this panel.

For those reasons and the other reasons set out in the motion, which are generally to that effect, we ask the Court not to so inquire of the panel and not to so qualify the panel in order that Russell Tunnell not be prejudiced before the 12 who are eventually chosen to serve on this Jury with the final suggestion that even though the Court will instruct the Jury probably more than once and at least in the Court's charge the fact this man stands charged with a crime by indictment shall be taken as no evidence of his guilt and cannot be so considered by the Jury. It is our contention that that comes too late and becomes confusing in the minds of the Jurors and, consequently, the earlier inquiry of the panel as to whether one may be charged with a crime and, if so, allowing the Jury to learn in that fashion that they may be disqualified prejudices the Defendant and violates his constitutional rights.

THE COURT:

The Defendant's motion in connection with the voir dire examination of the Jury will be denied.

**APPENDIX 7**

[13] MR. TYNER:

Your Honor, would you allow Mr. Tunnell to explain — he paid this money back, made restitution.

THE COURT:

All right, and then on July 3rd, 1956, is it true that at Corpus Christi, Texas, you were found guilty of driving while intoxicated?

THE DEFENDANT:

Possibly so, yes, sir.

THE COURT:

Is it true that in 1956 at Houston, Texas, you were sentenced to three years in the state penitentiary for burglary?

THE DEFENDANT:

Yes, sir.

THE COURT:

That you were paroled January 31st, 1958, and successfully completed your parole?

THE DEFENDANT:

Yes, sir.

THE COURT:

Of course, the testimony at the trial indicated that at least a part of the business that you were engaged in at the time of the offenses charged against you related to prostitution, and, and I understand it, this was

not denied. This Court has had several persons before it who were convicted of the offense of attempted evasion of income tax and similar offenses relating to the income tax evasion laws. All of them up to now, as I recall it, had no prior record. In each instance I saw fit to assess a term in the state

---

## APPENDIX 8

[463] A No, sir.

Q Are you saying it didn't happen, or you don't recall it?

A No, sir, it didn't happen that way. Mr. Tunnell told me, like I testified before, that he purchased a '69 Cadillac and got behind in his payments, and Mr. Gates paid for it.

Q Can you tell me now, Mr. Gann, what was the next date that you interviewed Mr. Tunnell?

A That's the last date I interviewed Mr. Tunnell.

Q Didn't interview him on February 13, 1970, by telephone?

A Oh, well, you said interviewed. I talked with him by telephone twice in 1970, February 13 and March 10.

Q Can you recall, Mr. Gann, during your interview with Mr. Tunnell on which occasion it was and the fact that he did tell you that in reporting his income he simply reported whatever income he had from prostitution as part of the lounge income?

A Yes, that was during the first interview with him.

Q And it is true that you have seen the single-entry

ledger sheets where he recorded in that fashion income from the lounge?

A Yes, sir.

[464] Q And are you able to tell this Jury that a computation of those figures from those books equaled the income shown on the tax return by the accountant from that source?

A I think there was some variance in it, but I can't recall exactly what it was.

Q Insignificant in amount?

A There wasn't much.

MR. TYNER:

If it please the Court, I will need a moment. This is a record of an interview I have not seen.

(PAUSE)

Q Mr. Gann, it is necessary that I establish for the record a chain of possession of the books and records, the evidence in this case of Mr. Tunnell. I would like to establish it, if I can, by you that the evidence which came from Mr. Tunnell's records which we earlier stipulated about, was not all of the records which you had in your possession for examination during your investigation of this case, that there were other Tunnell records in the form of registration cards and that sort of thing.

A Oh, yes.

Q And those records were made available to you through Mr. Lawrence's office.

A Right, with Mr. Tunnell's permission.

## APPENDIX 9

[767] MR. BAIN:

Defendant objects to the failure of the Court to include Defendant's Requested Charge No. 35.

THE COURT:

Would you kindly read that to me.

MR. BAIN:

"It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay."

THE COURT:

What says the United States as to this particular requested instruction?

MR. SLIVKA:

Your Honor, the Government maintains there has been no evidence respecting any civil assessment or conclusion of this matter, and that this is not relevant to the issues before the Court.

MR. TYNER:

It is our position, Your Honor, if I may speak in addition to Mr. Bain — this is from the *Spies* case, a United States Supreme Court case, and in that case there was no such issue insofar as the civil nature or other remedies are concerned.

THE COURT:

I believe this is adequately covered by other instructions of the Court.

---

**APPENDIX 10**

[771] MR. BAIN:

Defendant objects to the failure of the Court to submit its Requested Charge No. 29 which reads as follows:

"Sanctions to insure payment of tax are even more —"

THE COURT:

I'm sorry. I'm not hearing you.

MR. BAIN:

"Sanctions to insure payment of tax are even more varied to meet the variety of causes of default. It is the right as well as the interest of the taxpayer to limit his admission of liability to the amount he actually owes. But the law is complicated. Accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appear from the number of taxpayers who make overpayments of their taxes. It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay. If any part of the deficiency is due to negli-

gence or intentional disregard of rules and regulations but without intent to defraud, five percent of such deficiency is added thereto, and if any part of [772] any deficiency is due to fraud with intent to evade tax, the addition is fifty percent thereof. Willful failure to pay the tax when due is punishable as a misdemeanor. The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax."

THE COURT:

The objection to the Court's charge for failure to include this requested instruction is denied, and the tendered instruction is refused.

MR. BAIN:

Lastly, Defendant objects in general to the charge of the Court and views the same as prejudicial and resubmits his requested charges, all of his requested charges heretofore submitted to the Court.

THE COURT:

I'm not going to entertain any objections unless I am referred to something specific. Now, if you're going to make reference to all requested charges, you're going to have to tell me which ones you're referring to and read them to me.

MR. BAIN:

Your Honor, we have submitted heretofore thirty-seven requested charges to the Court. We want to make certain that we have not waived.

## APPENDIX 11

§ 1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, *shall deem any person qualified to serve on* grand and *petit juries in the district court unless he* —

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English llanguage;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) *has a charge pending against him* for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 58; Apr. 6, 1972, Pub.L. 92-269, § 1, 86 Stat. 117.

---

**APPENDIX 12**

[6] THE COURT:

*Is there anyone on the Panel who at this time is under indictment or other form of legal accusation of a crime punishable by more than one year's imprisonment, whether that indictment or other form of accusation is pending in either the State Court or Federal Court?*

Is there anyone on the Panel who has ever been convicted of a crime punishable by more than one year's imprisonment in either State or Federal Court?

Is there anyone on the Panel who has served on either a Grand Jury or Petit Jury in this Court within the past two years?

Is there anyone on the Panel who is not at least twenty-one years of age and qualified to vote in the county of his residence under the Constitution and laws of the United States?

I believe I incorrectly phrased one of my questions to you a minute ago, and I want your answers again.

Is there any member of the Panel who has not resided in the county of his residence for at least one year next preceding this date?

No. 73-849

FEB 6 1974

MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1973

---

PERRY RUSSELL TUNNELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D. C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1973

---

No. 73-849

PERRY RUSSELL TUNNELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

After a jury trial, petitioner was convicted in the United States District Court for the Eastern District of Texas on three counts of having willfully attempted to evade his individual income taxes by filing false and fraudulent tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954. Concurrent sentences of four years' imprisonment on each of the three counts were imposed.

Petitioner seeks review on the grounds that the evidence was insufficient, that the prohibition of 28 U.S.C. 1865(b)(5) against jury service for persons under indictment for federal or state felonies is unconstitutional, that certain evidence was erroneously admitted, and that the jury instructions were improper.

The evidence showed that petitioner operated two lounges, a hotel, a trailer park, and a farm, and that he also received income from oil and gas leases and from prostitution in connection with the hotel and one of the lounges (R. 394-397, 445-452, 648-650, 820-821, 849-850).[1] The government reconstructed petitioner's income by the net worth method, which showed taxable income of $9,236.73 in 1965, $35,579.77 in 1966, and $34,783.42 in 1967, or a total of $79,599.92 of taxable income for the three years. Petitioner, however, reported a net loss on his tax returns for these years (R. 783-785).

1. In challenging the sufficiency of the evidence (Pet. 24-35), petitioner does not seriously question the net worth figures, which showed a true taxable income for the three years of almost $80,000 compared to the net loss reported on the tax returns. There were obviously substantial tax deficiencies for each of the years, and the filing of the false returns constituted willful attempts to evade those taxes. The only remaning necessary element for the government

---

[1] "R." references are to the record appendix in the court of appeals.

to prove was willfulness, *Sansone* v. *United States*, 380 U.S. 343, 351, and the jury could readily infer that element from the consistent pattern of large understatements of income and petitioner's failure to include all of his income in his books and records, *Holland* v. *United States*, 348 U.S. 121, 139.

2. Equally without substance is the argument (Pet. 6-9) that 28 U.S.C. 1865(b)(5) is unconstitutional because it prohibits persons under indictment for state or federal felonies from serving on petit juries in federal courts. Apart from the fact that no such allegation of unconstitutionality was made in the courts below (*Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16), Congress may exclude from jury service any person who was under felony indictment by either a state or by the federal government, since such persons could be prejudiced against criminal prosecutions.

3. Petitioner contends (Pet. 10-11) that the trial court erred in refusing to instruct the jury (R. 1068, 1072-1073) that the tax law does not penalize frank differences of opinion and errors made despite the exercise of reasonable care, because such errors are corrected by the assessment of the deficiency of tax and its collection with interest. As the trial court stated (R. 1068), this point was adequately covered by the other instructions, which made it clear that the issue the jury was to decide was not the exact amount of tax due but whether petitioner had willfully attempted to evade and defeat it.

Petitioner also contends (Pet. 10) that the trial

court erred in admitting in evidence petitioner's income tax returns for 1963 and 1964, the years immediately prior to the prosecution years. These returns were admitted for the limited purpose of showing that petitioner's reported income for those years was not sufficient to permit the accumulation of any undeposited cash on hand as of December 31, 1964 (R. 587, 999, 1088). For this purpose they bore directly on the accuracy of the starting point of the government's net worth analysis, as required by *Holland* v. *United States*, 348 U.S. 121, 133. See *United States* v. *Chapman*, 168 F. 2d 997, 1001 (C.A. 7). There is therefore no basis for petitioner's contention (Pet. 10) that the court's instruction (R. 1058) permitted the jury to use intent in non-prosecution years to supply intent for subsequent years.[2]

4. Finally, petitioner argues (Pet. 12-14) that he was improperly denied pretrial disclosure of a partial list of the government's witnesses, *i.e.*, those who would link petitioner with the receipt of illegal income. In a non-capital case, the granting of a defendant's request for a list of adverse witnesses is a

---

[2] There is also no merit in petitioner's contention (Pet. 17, 31-32) that the trial court erred in admitting evidence that petitioner had engaged in prostitution activities during the prosecution years. Such evidence was admissible to prove a likely source from which some of the unreported income may have come. *United States* v. *Chapman*, 168 F. 2d 997, 1001 (C.A. 7). Cf. *Holland* v. *United States*, *supra*, 348 U.S. at 137-138. Petitioner's assertion that the prostitution income was correctly reported on his tax returns is unsupported, for there was no possible way that such a determination could be made from his books and records.

matter within the discretion of the trial judge (*United States* v. *Hancock*, 441 F. 2d 1285, 1286 (C.A. 5), certiorari denied, 404 U.S. 833; *O'Neal* v. *United States*, 411 F. 2d 131, 138 (C.A. 5), certiorari denied, 396 U.S. 827) and petitioner has shown no abuse of discretion.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

FEBRUARY 1974.

[3] *Will* v. *United States*, 389 U.S. 90 (Pet. 13-14), is not in point. There the Court merely held that mandamus did not lie to vacate the trial judge's pretrial order to the government to disclose the names of certain witnesses. Such a pretrial order was held not to be an abuse of discretion.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 531744 170

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-849

PERRY RUSSELL TUNNELL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jerry Bain
TYNER, BAIN & TYNER
237 South Broadway
Tyler, Texas 75701
A/C 214/593-8284

Attorneys for Petitioner

## TABLE OF CONTENTS


| | Page |
|---|---|
| Jurisdiction | 1 |
| Question No. 1 Restated | 2 |
| Question No. 2 Restated | 3 |
| Certificate of Service | 9 |
| Certificate of Counsel in Accordance with Rule 58(2) | 10 |


## TABLE OF AUTHORITIES

*Cases:*


| | |
|---|---|
| Aldridge vs. United States, 283 U.S. 308, 51 Sup. Ct. 470, 75 L.Ed. 1054 (1931) | 3 |
| Ham vs. South Carolina, 93 Sup. Ct. 848 | 3 |
| Tunnell vs. United States, 481 F.2d 152 (1973) | 5 |
| United States vs. Andros, 484 F.2d 531 (1973) | 4 |
| United States vs. Bishop, 93 Sup. Ct. 2008 (1973) | 4, 7 |
| United States vs. Calles, 482 F.2d 1155 (1973) | 8 |


*Statutes:*


| | |
|---|---|
| 26 U.S.C. 7201 | 5 |
| 26 U.S.C. 7203 | 5 |
| 26 U.S.C. 7207 | 5 |
| 28 U.S.C. 1254(1) | 2 |

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-849

PERRY RUSSELL TUNNELL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

# PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, PERRY RUSSELL TUNNELL, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit. On this Motion for Rehearing, Petitioner brings forward two specific points: (1) PERRY RUSSELL TUNNELL was denied a fair and impartial jury; and (2) "Willfulness" is lacking as a matter of law in the case at Bar when the "Bishop test" is applied to the Fifth Circuit Opinion.

## JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered October 1, 1973; and a Petition

for Certiorari was filed within thirty (30) days of such date. The denial of the Petition for Writ of Certiorari was made by Order entered by the Honorable Supreme Court of the United States on February 25, 1974; and this Petition for Rehearing has been filed within twenty-five (25) days from such date. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Title 28 U.S.C. 2403 is also applicable.

## QUESTION NO. 1 RESTATED

*PERRY RUSSELL TUNNELL WAS DENIED A FAIR AND IMPARTIAL JURY.*

### *Argument and Authorities under Question No. 1*

An involved dissertation into additional rhetoric on the points heretofore raised by our Petition for Writ of Certiorari will not be presented in this Petition for Rehearing. However, because the facts of the controversy surrounding this tax evasion case are of a substantial nature involving millions of taxpayers in the United States and because of the intervening decision by the Fifth Circuit Court of Appeals on a case similar to the case at Bar, together with Counsel's sincere belief that asking prospective jurors whether they are under indictment violates each Defendant's rights to due process and a fair and impartial jury in criminal prosecution, we feel that substantial grounds of utmost sions from the same Fifth Circuit to which Petition for Writ of Certiorari is requested, have occurred since the decision has been rendered by this Court not to grant certiorari. We sincerely hope that this short

memorandum will aid and assist the Court in altering the previous ruling and in the exercise of judicial discretion, grant Petitioner's Writ.

In the recent case of *Ham vs. South Carolina*, 93 Sup. Ct. 848, questions refused by the Trial Judge at time of voir dire examination of the jury were determined to be error. The landmark decision on which this issue was based is the old case of *Aldridge vs. United States*, 283 U.S. 308, 51 Sup. Ct. 470, 75 L.Ed. 1054 (1931). Our issue, though different in substance, has exactly the same effect.

The asking of prospective jurors if they are under indictment as a fundamental disqualification from jury service is prejudicial to an accused who is under indictment. This is a judgment call that the conscience of the Supreme Court of the United States must decide, but the matter has been preserved by motions to the Court prior to the asking of the question — and a motion to quash the panel after the question was asked. It is respectfully asserted that the asking of this question based upon statutory demands is unconstitutional, but at the very least the defendant has been denied due process because of the voir dire examination and has not received a fair and impartial jury.

**QUESTION NO. 2 RESTATED**

***"WILLFULNESS" IS LACKING AS A MATTER OF LAW IN THE CASE AT BAR WHEN THE "BISHOP TEST" IS APPLIED TO THE FIFTH CIRCUIT OPINION.***

*Argument and Authorities under Question No. 2*

This Honorable Supreme Court set forth in *United States vs. Bishop*, 93 Sup. Ct. 2008 (1973) the express holding that there was no distinction between the definition of the term "willful" in the misdemeanor statutes and in the felony statutes. At Page 2015 of that opinion, the following statement is quoted:

> "The same analysis was applied to the requested lesser-included-offense instructions for Section 7203 Id., at Page 352, 75 Sup. Ct. 1010. The clear implication of the decision in *Sansone* in that the word 'willfully' possessed the same meanings in Sections 7201, 7203 and 7207. *Sansone* thus foreclosed the argument that the word 'willfully' was to be given one meaning in the tax felony statutes and another meaning in the tax misdemeanor statutes."

Perhaps Judge Ely, the Circuit Judge for the Ninth Circuit in *United States vs. Andros*, 484 F. 2d 531 (1973) set forth in his opinion one of the items that has been missing in the TUNNELL case from its inception and which has been argued to both the Trial Judge in Motions for Judgments of Acquittal, to the Appellate Court of Appeals and to this Honorable Supreme Court in that the one element missing was the "willfulness" of Defendant, RUSSELL TUNNELL, in this case. The Government did not show any evidence of Mr. TUNNELL's financial circumstances so that he would be in a position to pay the tax asserted by the Government to be owing, even if the Government's net worth prose-

cution method is to be accepted. Even in a 7203 misdemeanor, "failure to pay" case, ability to pay tax is necessary element. The Fifth Circuit Opinion ignores this fact.

Using the TUNNELL Opinion itself, as found on Page 152 of 481 F. 2d, the Fifth Circuit runs out of reasons for finding the willful intent and motive necessary to convict Mr. TUNNELL. At the bottom of the first column and the top of the second column, they find and cite good law stating that an evil motive is required and an affirmative act is necessary. Then it is judicially declared that $829.43 is a large amount of income tax; they rely upon a conclusion by the Revenue Agent, objected to by Defendant, that "inadequate records were kept by the taxpayer"; and then allow an inference to be created on willfulness "*sufficient*" to create a jury question.

If this were not weak enough on the evil motive requirement, the "affirmative" act necessary then is inferred from the returns themselves. In any tax controversy, there is a discrepancy between the returns as filed and the Government's figures. If this discrepancy can be now used as the "affirmative act necessary to commit criminal tax evasion", there is not a safe individual in the United States who has once subscribed his name to a 1040 Tax Form. 26 U.S.C. 7203 and 7207 misdemeanor offenses cannot be fused together under the "Bishop test" to create a felony offense under 7201. This is the error made by the Fifth Circuit.

As this Honorable Court set forth in Bishop at Page 2017, "this long-standing interpretation of the purpose of the reoccurring word 'willfully' promotes coherence in the group of tax crimes." In our complex tax system, uncertainty often arises, even among taxpayers who earnestly wish to follow the law. The Court has said:

> "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." Spies 317 U.S. at Page 496, 63 Sup. Ct. at Page 367. "Degrees of negligence give rise in the tax system to civil penalties. The requirement of an offense committed 'willfully' is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court. Authorities cited. The Court's consistent interpretation of the word 'willfully' to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well meaning but easily confused mass of taxpayers."

It is respectfully asserted that Mr. TUNNELL is going to serve four (4) years in prison because of this play on words between the various Circuit Courts and this Honorable Supreme Court.

The Motions for Judgments of Acquittal made at the close of the Government's case, made at the close of the case in Chief and made after the Jury verdict

should have been granted by the Trial Court, should have been reversed and rendered by the Fifth Circuit Court of Appeals; and it is now respectfully asserted that this Motion for Rehearing on Petition for Certiorari should be granted because of the inconclusive proof of this important and carefully characterized "willful" tax crime set forth by this Honorable Court in *United States vs. Bishop.* If *Bishop* is the yardstick on willfull intent, a Judgment of Acquittal should have been entered in this case. A careful reading of the TUNNELL case compared with the test set forth in *Bishop* will substantiate that the TUNNELL case simply does not measure up.

It rarely appears that one can look to the Supreme Court and say "I told you so"; but realistically speaking, the admonishment made in our presentation of seeking a Writ of Certiorari, "the flood gates will be open by the TUNNELL Opinion being affirmed", has been substantiated in the classification by the National Reporter Systems. A denial of this Motion for Rehearing will add to the ever increasing number of decisions destroying the accused's presumption of innocence and placing in its stead, the statements set forth by the Fifth Circuit Court of Appeals when they *presumed* $142.08 was understating a large amount of tax; *presumed* that evidence of *poor* record keeping was evidence of *inadequate* records permitting the *inference* of willfulness; and allowed that to create a jury question or an inference; and from that *inference* used it as a springboard to have the tax returns now *inferred*

to be "false" to be the necessary *"affirmative act."* NO ONE CAN DEFEAT NOR DEFEND AN ALLEGATION AGAINST HIM IF ALL OF THESE PRESUMPTIONS CAN BE INDULGED IN BY THE PROSECUTION IN A NET WORTH CASE, WHICH IS ITSELF ONLY AN APPROXIMATION.

How can this Court allow all of this circumstantial evil motive and bad intent to meet the Bishop test when the agent testified to direct evidence of his good intent, cooperation and willingness to supply records. (Trans. pp. 632, 655, 731, 734, 742, and 764.)

Another conflict in the case seems so apparent when one looks at *United States vs. Calles*, 482 F. 2d. 1155 (1973), decided shortly after TUNNELL's case here at Bar. We find the Fifth Circuit contradicting itself on one of the very points raised in the Fifth Circuit and also on our Petition for Writ of Certiorari. The Fifth Circuit held that the pre-prosecution years tax returns of 1962, 1963 and 1964 were admissible in the TUNNELL case. The Fifth Circuit held Appellant could not introduce his income in 1968, a pre-prosecution year, and said it was irrelevant to prove his net worth at the close of that year. These holdings are inconsistent and incorrect and we implore this Court to the benefit of all the millions of taxpayers in the United States that are subjected to potential criminal prosecu-

tion *here sanctioned,* to grant certiorari and set forth definitive guidelines for a net worth prosecution case.

Respectfully Submitted,

TYNER, BAIN & TYNER
Attorneys for Petitioner
237 South Broadway
Tyler, Texas 75701
A/C 214/593-3284

Jerry Bain

**CERTIFICATE OF SERVICE**

I hereby certify that three (3) true and correct copies of the foregoing Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed, postage prepaid, air mail, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and three (3) true and correct copies of same to Mr. Roby Hadden, United States Attorney, Federal Building, Tyler, Texas 75701, postage prepaid, this the 19 day of March, A.D. 1974.

Jerry Bain

## CERTIFICATE OF COUNSEL IN ACCORDANCE WITH RULE 58 (2)

Now comes JERRY BAIN, Counsel of Record for Petitioner, PERRY RUSSELL TUNNELL, Defendant-Appellant, on this Petition for Rehearing on Appellant's Petition for Writ of Certiorari and respectfully states to the Honorable Supreme Court of the United States that this Petition for Rehearing is presented in good faith and not for delay; the Petition for Rehearing is restricted to grounds specifically set forth in Rule 58(2) of the Supreme Court Rules.

JERRY BAIN